

## House Bills 5366-5370

### Fiduciary Access to Digital Assets

#### House Judiciary Committee

#### Testimony of Howard H. Collens, Esq.

Good morning Mr. Chairman and Members of the Committee. My name is Howard Collens. I appear before you this morning as a member of the Updating Michigan Law Committee of the Probate and Estate Planning Section of the State Bar of Michigan. I am also a member of the Elder Law and Disability (ELDR) Section and have served as a liaison to the ELDR section in relation to the drafting in this area undertaken by the Updating Michigan Law Committee. I am a member of the law firm of Galloway and Collens, PLLC located in Huntington Woods, Michigan.

The use of the internet in all segments of life is a daily reality of the 21<sup>st</sup> Century. From all varieties of commerce to social networking, storage of photos and data in the cloud to sending emails, texts and photos, there is not a minute of the day that goes by where someone is not engaging in the use of the internet. It is also true that every day, people are becoming incapacitated or dying. To date, Michigan law has not directly addressed the intersection of these two realities.

House Bills 5366-5370 propose to provide, for the first time, a comprehensive approach to allowing fiduciaries to access the digital assets of a person who has become incapacitated or has died. These Bills will authorize a fiduciary - including agents under powers of attorney, guardians and conservators, personal representatives in decedent's estates and trustees of trusts - to be able to access and utilize the incapacitated or deceased individual's online assets. Creating new law in this area will benefit both the general public and practitioners alike.

Over the course of the last couple of years, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has engaged in a thorough and thoughtful process to develop a Uniform Fiduciary Access to Digital Assets Act. The Updating Michigan Law Committee has reviewed, in depth, the emerging NCCUSL approach and had, earlier this year, proposed a Michigan specific version of the law for Fiduciary Access to Digital Assets (FADA).<sup>1</sup>

On March 15, 2014, the Probate and Estate Planning Section adopted a position that supports HB 5366-5370 and encourages further amendment of the bills as proposed.<sup>2</sup> The Section had adopted and approved a unified, stand-alone version of the FADA for Michigan prior to the final adoption of the uniform act by NCCUSL. The Section currently is undertaking further revisions of a proposed FADA for Michigan which will include further improvements gleaned from the final NCCUSL version as well as incorporate Michigan specific enhancements.

It is beneficial to have the law enacted in Michigan consistent with the NCCUSL version of FADA to achieve the benefits of uniformity among the states. Namely, fiduciaries will enjoy equal, more efficient access to digital assets and custodians of digital data will benefit from uniform regulation.

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<sup>1</sup> The NCCUSL drafting committee switched approaches midway through their drafting process from inserting FADA content into existing probate law to a unified, stand-alone approach which consolidates the topic into a single law. The final version was adopted by NCCUSL in July 2014.

<sup>2</sup> The public policy position of the Probate and Estate Planning Section may be found here: <http://www.michbar.org/publicpolicy/positionpdfs/positionPDF1500.pdf>

The Section believes that a unified, stand-alone approach to the Michigan FADA is preferred to the interspersed approach that the current package of bills takes. A unified approach (1) makes it easier for the public and practitioners to be able to find the relevant details relating to FADA, (2) recognizes the unique nature of digital assets and (3) tracks the final NCCUSL version.

We have been encouraged by our preliminary work with Representative Cotter on this important topic. It is the Section's hope that we can continue to work with the relevant policymakers and stakeholders to enact a law on Fiduciary Access to Digital Assets that will support and enhance the probate and trust law in the 21<sup>st</sup> century and beyond.<sup>3</sup>

Thank you for your time. I would be happy to address any questions that you may have for me.

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<sup>3</sup> Only a handful of states have enacted legislation addressing FADA. Michigan can and should be an early adopter of a comprehensive approach in this area.